

No. 15582

United States
Court of Appeals
for the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY, a
corporation, Appellant,
vs.

ORE-IDA POTATO PRODUCTS, INC., a cor-
poration, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

AUG - 5 1957

PAUL P O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

ROY F. SHIELDS,

JOSEPH G. BERKSHIRE,

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For Appellant.

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P. O. Box 117,
Ontario, Oregon,

For Appellee.

United States District Court
District of Oregon

Civil Action No. 8429

UNION PACIFIC RAILROAD COMPANY, a
corporation, Plaintiff,

vs.

ORE-IDA POTATO PRODUCTS, INC., a cor-
poration, Defendant.

COMPLAINT

For cause of action again defendant, plaintiff al-
leges:

I.

Jurisdiction of this Court in this action is
founded upon the existence of a question arising
under the Act of Congress approved February 4,
1887, entitled "An Act to Regulate Commerce"
(U. S. Code Annotated, Title 49, Chapters 1 and
2), and Acts amendatory thereof and supplemental
thereto.

II.

At all times material hereto, the plaintiff was and
now is a corporation incorporated under laws of the
State of Utah, and defendant was and now is a
corporation incorporated under laws of the State of
Oregon.

III.

At all such times plaintiff was and now is a com-
mon carrier by railroad subject to the Interstate

Commerce Act (Title 49 USCA, Sections 1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon, and various destinations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern Districts of the United States for distribution and sale.

IV.

Commencing on or about January 6, 1954, and continuing until on or about October 2, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 50 carload shipments of frozen foods and vegetables with directions that each of such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by the defendant. The first of said shipments was so delivered on or about January 19, 1954.

V.

The lawful tariffs of the plaintiff and said other connecting common carriers by railroad, involved in the transportation of such shipments from Ontario, Oregon, to such destinations, provided that charges of \$61,934.38 be made by said rail carriers for such transportation service and other charges incidental thereto, which sum the defendant became obligated to pay to the plaintiff upon acceptance of such shipments by the plaintiff for transportation. The defendant has paid to the plaintiff a total sum of \$56,047.81 toward such charges, leaving a balance of \$5,886.57, together with Federal transportation tax on such balance, amounting to \$176.90, or a total sum of \$6,063.47, unpaid and owing from the defendant to the plaintiff; but, notwithstanding repeated demands by the plaintiff for payment thereof, the defendant has failed, neglected and refused, and still refuses, to pay said sum of \$6,063.47, or any part thereof; and said sum of \$6,063.47 is now due and owing from the defendant to the plaintiff.

Wherefore, plaintiff seeks judgment against defendant in the sum of \$6,063.47, together with its costs and disbursements herein incurred.

/s/ ROY F. SHIELDS,

/s/ JOSEPH G. BERKSHIRE,

Attorneys for Plaintiff.

[Endorsed]: Filed January 17, 1956.

[Title of District Court and Cause.]

ANSWER

Defendant admits the allegations of the Complaint, except those stated in Paragraph No. V and those it denies except it admits it has not paid the plaintiff the sum of \$6063.47.

By way of counterclaim against the plaintiff, defendant alleges:

I.

Jurisdiction of this Court in this counter-claim is founded upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U. S. Code Annotated, Title 49, Chapters 1 and 2), and Acts amendatory thereof and supplemental thereto.

II.

At all times material hereto, the plaintiff was and now is a corporation incorporated under laws of the State of Utah, and defendant was and now is a corporation incorporated under laws of the State of Oregon.

III.

At all such times plaintiff was and now is a common carrier by railroad subject to the Interstate Commerce Act (Title 49 USCA, Sections 1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and, subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon, and various desti-

nations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern Districts of the United States for distribution and sale.

IV.

Commencing on or about March 13, 1954, and continuing until on or about April 28, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 69 car-load shipments of frozen foods and vegetables with directions that each of such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern Districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by defendant. The first of said shipments was so delivered on or about March 20, 1954.

V.

The lawful tariffs of the plaintiff and said other connecting common carriers by railroad involved in the transportation of such shipments from Ontario, Oregon, to such destinations provided for

charges of \$26,583.08 be made by said railroad carriers for such transportation services and other charges incidental thereto. That the plaintiff erroneously charged the defendant for such shipments a total of \$32,562.13 notwithstanding the proper charges were the sum of \$26,583.08, leaving an overpayment in the sum of \$5979.05. That the defendant has demanded repayment of these overcharges from the plaintiff and there is now due, owing and unpaid from the plaintiff to the defendant the sum of \$5979.05 which the plaintiff has failed, neglected and refused and still refuses to pay.

Wherefore, defendant prays that the plaintiff take nothing by way of its Complaint and that defendant have Judgement against the plaintiff for the sum of \$5979.05 together with its costs and disbursements herein incurred.

/s/ P. J. GALLAGHER,

/s/ MARTIN P. GALLAGHER,

Attorneys for Defendant.

CERTIFICATE OF SERVICE

State of Oregon

County of Malheur—ss.

I hereby certify that on this date I served the within paper upon Randall Kester, one of attorneys for plaintiff, by depositing in the United States Post Office at Ontario, Oregon, a correct copy of the whole thereof in a sealed envelope with postage prepaid addressed to him at his regular

office address at 727 Pittock Block, Portland 5, Oregon.

Dated at Ontario, Oregon, March 29, 1956.

/s/ MARTIN P. GALLAGHER

Of Attorneys for Defendant.

[Endorsed]: Filed April 9, 1956.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM

Comes now the plaintiff and for its Reply to the alleged Counterclaim asserted by the defendant in this action, admits, denies and alleges as follows:

First Defense

1. Admits the allegations contained in paragraphs I, II, III and IV of said alleged Counterclaim.

2. Plaintiff denies each and all of the allegations contained in paragraph V of said alleged Counterclaim.

Second Defense

For its further and separate answer and affirmative defense to said alleged Counterclaim:

I.

Plaintiff alleges that the shipments contained in cars Nos. PFE 200481, PFE 200573, PFE 200040, PFE 200004, PFE 200699 and PFE 200663 were delivered to their consignees prior to April 9, 1954, and that the defendant's claims for alleged overcharges on said shipments have been barred by the statute of limitations.

II.

Plaintiff alleges that as to the balance of the shipments set forth in defendant's alleged Counterclaim, the charges collected by the plaintiff amounted to \$30,367.96, which were the full, true and lawful charges applicable to said shipments under the tariffs of the plaintiff and its connecting carriers.

Wherefore, having replied to the defendant's alleged Counterclaim herein, plaintiff prays that said Counterclaim be denied and that the plaintiff have judgment against the defendant for the full amount of \$6,063.47, together with its costs and disbursements herein incurred, as prayed for in its Complaint herein.

/s/ ROY F. SHIELDS,

/s/ JOSEPH G. BERKSHIRE,

Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 31, 1956.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

Agreed Facts

I.

Jurisdiction of this Court in this action is founded upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U. S. Code Annotated, Title 49, Chapters 1 and

2), and acts amendatory thereof and supplemental thereto.

II.

At all times material hereto, the plaintiff was and now is a corporation incorporated under the laws of the State of Utah, and defendant was and now is a corporation incorporated under the laws of the State of Oregon.

III.

At all such times plaintiff was and now is a common carrier by railroad subject to the Interstate Commerce Act (Title 49 USCA, §1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon and various destinations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern districts of the United States for distribution and sale.

IV.

Commencing on or about January 6, 1954, and continuing until on or about October 2, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 114 car-load shipments of frozen foods and vegetables including frozen potatoes with directions that each of

such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by the defendant. The first of said shipments was so delivered on or about January 19, 1954.

V.

Trans-Continental Freight Bureau Freight Tariff 2 series and supplements thereto effective between January 6, 1954 and October 2, 1955, prescribed general commodity rates and charges for the transportation of various commodities, eastbound from points in Oregon to points in Eastern, Middle Western and Southern districts.

VI.

Item 4600 of said tariffs described in Paragraph V hereof prescribes carload rates on "food cooked, cured or preserved, frozen NOIBN in containers in boxes." The letters "NOIBN" are abbreviations of the words "Not Otherwise Indexed by Name".

VII.

Item 4715 of said tariffs described in Paragraph V hereof prescribes carload rates on "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables either sweetened or not sweetened), in

packages as prescribed in Western Classification (Subject to Notes 1 and 6).” Said Notes 1 and 6 do not affect the issue in this action and are accordingly not set forth.

VIII.

The correct charges for those portions of the shipments described in Paragraph IV hereof consisting of frozen potatoes computed in accordance with Item 4600 of said tariffs, including the Federal transportation tax thereon, total the amount of \$67,579.27.

IX.

The correct charges for those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes computed in accordance with Item 4715 of said tariffs, including the Federal transportation tax thereon, total the amount of \$56,011.18.

X.

The amounts paid by defendant to plaintiff as charges due on those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes, including the Federal transportation tax thereon, totaled \$61,342.41.

XI.

The potatoes referred to above were hauled from farmers’ fields or warehouses, washed, peeled, sliced, steamed or washed, and oil blanched, and then quick frozen.

The oil blanching consisted of immersing the sliced potatoes in blanching oil at 350° F for one

and one-half minutes. They were partially browned by the oil blanching. They were cooled and quick-frozen to a temperature of -15° to -20° F, packaged, labeled, and stored in zero storage. They were shipped in refrigerated cars of the plaintiff. The purpose of blanching was to kill the enzymes in the raw potato and to stop bacterial decay. The purpose of freezing was to prevent spoilage and to preserve potatoes in a fresh condition.

Plaintiff's Contentions

I.

That the process described in Paragraph XI of the Agreed Facts involves the preparation of potatoes for consumption by the action of heat and renders the product a "food cooked, cured or preserved", within the meaning of Item 4600 of said tariffs described in paragraph V of the Agreed Facts.

II.

That by reason of the Agreed Facts hereinabove set forth the plaintiff is entitled to recover from the defendant as undercharges, including the Federal transportation tax, on the shipments described in Paragraph IV of the Agreed Facts the sum of \$6,236.86.

Defendant's Contentions

I.

That the process described in Paragraph XI of the Agreed Facts involves the preservation of potatoes by blanching and freezing. That by reason of the process described in Paragraph XI of the

Agreed Facts, the potatoes are not cooked and are not prepared for final consumption. That they are not properly classified under Item 4600 of the Tariffs described in Paragraph V of the Agreed Facts as cooked foods.

II.

That they are properly classified as frozen vegetables under classification 4715 of the Tariffs described in Paragraph V.

III.

That by reason of the Agreed Facts hereinabove set forth the defendant is entitled to receive from plaintiff as overcharges, including the Federal transportation tax on the shipments described in Paragraph IV of the Agreed Facts, the sum of \$5,331.24.

Issues to Be Determined

Were the potatoes which constitute the shipments described in Paragraph IV of the Agreed Facts "food cooked" as classified in Item 4600 of the tariffs described in Paragraph V of the Agreed Facts, or were said potatoes "vegetables, fresh" as classified in Item 4715 of said tariffs.

Dated this 13th day of February, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Plaintiff.

/s/ P. J. GALLAGHER,

/s/ MARTIN P. GALLAGHER,

Attorneys for Defendant.

The above Pre-Trial Order is approved and Issues for trial will be as herein settled. There will be no amendment to the Pre-Trial Order without the approval of the Court.

Dated this 13th day of February, 1957.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed February 13, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now plaintiff and moves the court for a summary judgment herein in favor of the plaintiff on the ground and for the reason that the pre-trial order agreed to by the parties and submitted to this court shows that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.

This motion is based upon Rule 56, Federal Rules of Procedure, and in the opinion of the undersigned, is well founded in law and the same is not made for the purposes of delay.

/s/ ROY F. SHIELDS, H.E.R.

/s/ HOWARD E. ROOS,

Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 11, 1957.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

The defendant may submit Findings in defendant's favor.

Dated March 14, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed March 14, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This matter coming on regularly at this time for Findings of Fact and Conclusions of Law, the Court makes the following:

Findings of Fact

I.

Jurisdiction of this Court in this action is found upon the existence of a question arising under the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce" (U. S. Code Annotated, Title 49, Chapters 1 and 2), and acts amendatory thereof and supplemental thereto.

II.

At all times material hereto, the plaintiff was and now is a corporation incorporated under laws of the State of Utah, and defendant was and now is

a corporation incorporated under the laws of the State of Oregon.

III.

At all such times plaintiff was and now is a common carrier by railroad subject to the Interstate Commerce Act (Title 49 USCA, Sec. 1, et seq.), doing business in interstate commerce and, together with other railroad companies also engaged in interstate commerce and subject to said Interstate Commerce Act, operating connecting lines of railroad between Ontario, Oregon and various destinations in the Eastern, Middle Western and Southern parts of the United States; and, the defendant was and now is engaged, at Ontario, Oregon, in the business of processing and freezing vegetables and other foods, and in shipping them to destinations in the Eastern, Middle Western and Southern districts of the United States for distribution and sale.

IV.

Commencing on or about January 6, 1954, and continuing until on or about October 2, 1955, the defendant delivered to the plaintiff at Ontario, Oregon, with charges prepaid, approximately 114 car-load shipments of frozen foods and vegetables including frozen potatoes with directions that each of such shipments be transported by the plaintiff and connecting lines of railroads to individual destinations in the Eastern, Middle Western or Southern districts of the United States and there delivered to particular consignees designated by the defendant. The plaintiff and said connecting lines of railroad

duly transported and delivered each and all of said shipments to the destinations specified by the defendant, and there delivered such shipments to the consignees designated by the defendant. The first of said shipments was so delivered on or about January 19, 1954. That the shipments on which defendant bases its counter-claim were made between April 9, 1954, and April 28, 1955.

V.

Trans-Continental Freight Bureau Freight Tariff 2 series and supplements thereto effective between January 6, 1954 and October 2, 1955, prescribed general commodity rates and charges for the transportation of various commodities, eastbound from points in Oregon to points in Eastern, Middle Western and Southern districts.

VI.

Item 4600 of said tariffs described in Paragraph V hereof prescribes carload rates on "food cooked, cured or preserved, frozen NOIBN in containers in boxes." The letters "NOIBN" are abbreviations of the words "Not Otherwise Indexed by Name."

VII.

Item 4715 of said tariffs described in Paragraph V hereof prescribes carload rates on "Vegetables, fresh or green, cold pack (frozen fresh or green vegetables either sweetened or not sweetened), in packages as prescribed in Western Classification (Subject to Notes 1 and 6)." Said Notes 1 and 6 do not affect the issue in this action and are accordingly not set forth.

VIII.

The correct charges for those portions of the shipments described in Paragraph IV hereof consisting of frozen potatoes as computed in accordance with Item 4600 of said tariffs, including the Federal transportation tax thereon, total the amount of \$67,579.27.

IX.

The correct charges for those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes computed in accordance with Item 4715 of said tariffs, including the Federal transportation tax thereon, total the amount of \$56,011.18.

X.

The amounts paid by defendant to plaintiff as charges due on those portions of the shipments described in Paragraph IV hereof, consisting of frozen potatoes, including the Federal transportation tax thereon, totaled \$61,342.41.

XI.

The potatoes are hauled from farmers' fields or warehouses, washed, peeled, sliced, steamed or washed, and oil blanched, and then quick frozen.

The oil blanching consists of immersing the sliced potatoes in blanching oil at 350° F for one and one-half minutes. They are partially browned by the oil blanching. They are cooled and quick-frozen to a temperature of -15° to -20° F, packaged, labeled, and stored in zero storage. They are shipped in refrigerated cars of the plaintiff. One purpose

of blanching is to kill the enzymes in the raw potato and to stop bacterial decay. The purpose of freezing is to prevent spoilage and to preserve potatoes in a fresh condition.

XII.

That the potatoes herein do not lose their substantial identity in the process described in Par. XI above and are frozen fresh vegetables.

That the potatoes are not a frozen cooked food.

Based upon the above Findings of Fact the Court makes the following:

Conclusions of Law

I.

That the process described in Paragraph XI above involves the preservation of potatoes by blanching and freezing. That by reason of the process described in Paragraph XI above, the potatoes are not cooked and are not prepared for final consumption. That they are not properly classified under Item 4600 of the Tariffs described in Paragraph V of the Agreed Facts as cooked foods.

II.

That they are properly classified as frozen vegetables under classification 4715 of the Tariffs described in Paragraph V.

III.

That by reason of the above the defendant is entitled to recover from plaintiff as overcharges, including the Federal transportation tax on the

Dated at Portland, Oregon, March 18th, 1957.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed March 18, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Union Pacific Railroad Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on the 18th day of March, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Appellant Union
Pacific Railroad Company.

[Endorsed]: Filed April 15, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Whereas, the plaintiff, Union Pacific Railroad Company, a corporation, in the above entitled and numbered cause, has appealed to the United States Court of Appeals for the Ninth Circuit from that certain judgment and the whole thereof, and each and every part thereof, made and entered in the above Court and cause on or about the 18th day of

March, 1957, in favor of the defendant and against the plaintiff, and providing as follows, to-wit:

“It Is Hereby Ordered that the defendant Ore-Ida Potato Products, Inc. be and it hereby is granted judgment against the plaintiff Union Pacific Railroad Company in the sum of Five Thousand Three Hundred Thirty - one and 24/100 Dollars (\$5,331.24) together with interest thereon from April 28, 1955, at the rate of six (6%) per cent per annum and that execution issue.

“Dated at Portland, Oregon, March 18, 1957.
/s/ Claude McColloch, District Judge”

Now, Therefore, in consideration of the premises and of such appeal, we the said plaintiff and appellant herein and Continental Casualty Company, a corporation organized and existing under the laws of the State of Illinois, do hereby jointly and severally undertake and agree, on the part of said plaintiff-appellant that said plaintiff-appellant will pay all damages, costs, interest, damages for delay, and disbursements which may be awarded against it on said appeal.

And Whereas, the plaintiff-appellant is desirous of staying execution of the judgment so appealed from, we do further in consideration thereof jointly and severally undertake and agree that if said judgment appealed from or any part thereof be affirmed, the said plaintiff-appellant, Union Pacific Railroad Company, a corporation, will satisfy the same so far as affirmed.

Done at Portland, Oregon, this 12th day of April,
1957.

UNION PACIFIC RAILROAD

COMPANY, a corporation,

/s/ By ROY F. SHIELDS,

Of Its Attorneys, Principal, and

[Seal] CONTINENTAL CASUALTY

COMPANY,

/s/ By H. F. WESTENFELDER,

Attorney in Fact.

Countersigned:

[Seal] TATE, WESTENFELDER & BERG,
INC.,

Resident Agent,

/s/ By H. F. WESTENFELDER.

April 17th, 1957.

/s/ CLAUDE McCOLLOCH.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 17, 1957.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF EXHIBITS

On motion of plaintiff-appellant, and good cause appearing therefor, it is

Ordered that the Clerk of this Court forward to the United States Court of Appeals for the Ninth Circuit in connection with the appeal of this cause the original papers, including Exhibits 1 and 2, which have been designated by the plaintiff-

appellant for inclusion in the record on appeal, in accordance with the usual practice of this Court in regard to the safekeeping and transportation of such papers and exhibits.

Done in open Court this 17th day of April, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed April 17, 1957.

[Title of District Court and Cause.]

ORDER AMENDING ORDER FOR
TRANSMITTAL OF EXHIBITS

On motion of plaintiff-appellant, and good cause appearing therefor, it is

Ordered that the directory provision of the order of this Court in the above-entitled action dated April 17, 1957 be amended to read as follows:

“Ordered that the Clerk of this Court forward to the United States Court of Appeals for the Ninth Circuit in connection with the appeal of this cause the original papers, including Exhibits 4 and 5, which have been designated by the plaintiff-appellant for inclusion in the record on appeal, in accordance with the usual practice of this Court in regard to the safekeeping and transportation of such papers and exhibits.”

Done in open Court this 14th day of June, 1957.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 14, 1957.

[Title of District Court and Cause.]

1956: DOCKET ENTRIES

Jan. 17—Filed complaint.

17—Filed and entered order appointing person to make service.

17—Mailed summons to John C. Elfering, Vale, Oregon, for service.

Feb. 6—Filed summons with return.

10—Filed stipulation.

10—Filed motion.

10—Filed and entered order extending time for defendant to appear 60 days.

Apr. 9—Filed answer, and certificate of service.

9—Filed defendant's request for jury trial.

20—Filed motion.

20—Filed and entered order extending time for filing of reply to May 31, 1956.

May 31—Filed reply to counterclaim.

Nov. 3—Entered order setting for Pre-Trial Conference January 7, 1957.

1957:

Jan. 7—Lodged Pre-Trial order.

17—Entered order setting for trial on February 12th.

Feb. 5—Entered order resetting for trial on February 13th, 1957.

11—Filed Motion for Summary Judgment.

13—Entered order denying above motion.

13—Record of Hearing by court (trial)—entered order that all briefs be filed before March 11th.

13—Filed Pre-Trial Order.

1957:

- Mar. 4—Filed defendant's memorandum.
11—Filed plaintiff's reply memorandum.
11—Filed plaintiff's supplemental memorandum.
11—Filed defendant's reply brief.
14—Filed Memorandum of Decision. Defendant to submit findings in its favor.
18—Filed and entered Findings of Fact and Conclusion of Law.
18—Filed and entered Judgment.
- Apr. 15—Filed notice of appeal by plaintiff.
16—Filed designation of record on appeal.
16—Filed statement of points.
16—Filed affidavit of service.
16—Filed motion for transmittal of exhibits to Court of Appeals.
17—Filed and entered order to transmit exhibits to Court of Appeals.
17—Filed supersedeas bond on appeal.
24—Filed defendant's additional designation of record on appeal.
- May 15—Filed transcript of proceedings.
17—Filed motion to extend time to docket appeal in Court of Appeals.
17—Filed amendment to designation of record on appeal.
17—Filed affidavit of service of motion and amended designation.
20—Filed and entered Order extending time to file appeal to June 14, 1957.
- June 6—Filed appellant's supplemental statement of points.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America

District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Certificate of service and answer; Reply to counterclaim; Pre-trial order; Motion for summary judgment; Memorandum of decision; Findings of fact and conclusions of law; Judgment; Notice of appeal; Statement of points; Supersedeas bond on appeal; Designation of record on appeal; Order for transmittal of exhibits; Amendment to designation of record on appeal; Appellant's supplemental statement of points; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8429, in which Union Pacific Railroad Company, a corporation, is the plaintiff and appellant and Ore-Ida Potato Products, Inc., a corporation, is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the reporter's transcript of proceedings, together with Exhibits 4 and 5.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 6th day of June, 1957.

[Seal] R. DE MOTT,
Clerk,
/s/ By THORA LUND,
Deputy.

United States District Court
District of Oregon

No. Civil 8429

UNION PACIFIC RAILROAD COMPANY, a
corporation, Plaintiff,

vs.

ORE-IDA POTATO PRODUCTS, INC., a cor-
poration, Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, February 13, 1957.

Before: Honorable Claude McColloch, Chief
Judge.

Appearances: Mr. Howard E. Roos, of Attorneys
for Plaintiff; Mr. Martin P. Gallagher, of Attor-
neys for Defendant.

The Court: Union Pacific vs. Idaho Potato. I
have read the file. Is there any oral testimony?

Mr. Gallagher: Yes, there is some oral testimony,
your Honor.

The Court: All right. Put it on.

Mr. Roos: If your Honor please, I have a brief [1]* to submit on a motion for summary judgment.

The Court: Yes.

Mr. Roos: We have taken the position that this is a question of law for the Court only. Would you care to hear argument on it right now?

The Court: Have you any oral testimony?

Mr. Roos: We have none, and we had hoped to exclude it.

The Court: What?

Mr. Roos: I say, we had hoped to exclude any oral testimony.

The Court: You don't have any to offer at this time?

Mr. Roos: We have none ourselves, and we feel that no oral testimony is warranted.

The Court: I understand. There is no law that keeps them from putting on testimony. All right. Put on your testimony, Mr. Gallagher. [2]

EVAN GHEEN, JR.

was produced as a witness in behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gallagher): Mr. Gheen, you work for the defendant, Idaho Potato Products Corporation?

A. Yes, I do.

Q. In what capacity?

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Evan Gheen, Jr.)

A. My title is Assistant Sales Manager, and I have other duties relating to quality control and traffic.

Q. Ore-Ida Potato Products is located in Ontario, Oregon, is it not? A. That is correct.

Q. Tell me what products do they process there?

A. We process potatoes and corn and occasionally carrots, and we have a packaging operation on mixed vegetables.

Q. Generally, it is a quick-freezing plant for fresh vegetables?

A. A food processing and quick-freezing plant.

Q. Do you also handle stringbeans, lima beans and the mixed vegetable field? A. Yes, we do.

Q. Can you describe to the Court the process by which these particular products, lima beans, stringbeans, carrots [3] and potatoes are processed? Start in with the bringing of the product into the plant and the washing.

A. Would you repeat the question?

Q. Could you describe to us the process that is used in the plant for the fresh vegetables?

A. Any particular fresh vegetables, though?

Q. Any of them.

A. The product is brought to the plant from the grower's field, is weighed, washed, peeled, if necessary, and specked, as we think of it in cleaning up the product, and is blanched, inspected, given an additional washing and drying when necessary, and frozen and packaged. Sometimes that is reversed—packaged and frozen.

(Testimony of Evan Gheen, Jr.)

Q. Now, you speak of blanching. What is blanching?

A. The process of blanching is necessary in the preservation of food. You apply heat to the product by means of hot water or steam to inactivate the enzymes which contribute to the decomposition of the food if they are active.

Q. In an item such as corn and carrots how long does the blanching process take for the purpose of killing enzymes? A. May I refer to my notes?

Q. Yes, if you have some.

A. Cob corn, for example, would be blanched between seven and nine minutes at a temperature of 204 degrees. Cobbed corn would be blanched three and a half to four minutes at [4] a temperature of 204 degrees. Peas would be blanched up to three minutes at a temperature of 204 degrees.

Q. Then are they frozen after blanching?

A. Shortly after blanching, yes.

Q. And then stored and packaged or packaged and stored? A. Yes.

Q. Now, in the case of potatoes, which we are dealing with here, can you describe in some detail the precise process of handling potatoes?

A. Yes. The potatoes go through much the same process as other frozen foods. They are brought from the grower's field to the plant, are weighed and passed through a washer and a lye bath process.

Q. Excuse me. Would you repeat that?

A. The potatoes are brought from the grower's field to the plant, are weighed and passed through

(Testimony of Evan Gheen, Jr.)

a lye bath process which loosens the skin. They go from there to a specking table, where the ladies trim the eyes out, and such as that—any bad spots. They pass through a cutting machine into the blanchers, where they are water-blanching at a temperature of 190 degrees for a period of one minute plus or minus five seconds. They pass into an oil blanch, which is at approximately 350 degrees, but it may vary upward or downward, for a period ranging from one minute to a minute and 30 seconds, following which they pass through a drier, or something that [5] blows on them, into the deep freeze, following which they are packaged and stored.

Q. Now those are the French fries?

A. That is correct.

Q. Other potato products are potato patties and cubes; is that correct?

A. French cuts, patties and cubes.

Q. Now, is the process relative to them the same except for the oil blanching?

A. The process of oil-blanching is converted over into a water blanch. In other words, you increase the water-blanch time in an amount equivalent to the oil-blanch time.

Q. Those that do not have an oil blanch have a longer water blanch?

A. It is necessary to have—the answer is Yes.

Q. What is the purpose of blanching?

A. The purpose of blanching is to inactivate the enzymes.

(Testimony of Evan Gheen, Jr.)

Q. Is that accomplished in a longer water blanch and is it also accomplished in a shorter water blanch plus the oil blanch?

A. That is correct.

Q. Is there any other purpose in oil-blanching?

A. The only other purpose would be to coat the product with oil.

Q. Why is that desirable? [6]

A. Because the customer wants us to coat it with oil, as we can do it cheaper than he can.

Q. Is there any advantage relative to shipping?

A. There is an advantage both in the freezing and in shipping. If you don't coat it in oil, the product sometimes sticks together so that the shipper would have difficulty in separating the individual pieces. At the same time, it can be done. I wouldn't say that there is an advantage in shipping, no.

Q. Then after the oil blanching they are then frozen and then shipped? A. Yes.

Q. Now what is the method of preparation of the French fries by the ultimate consumer, either the housewife or the institutional user?

A. The institutional user will take out a case of French fries prior to the use of them and allow them to thaw for a period of time, following which he introduces them into his fryer and cooks them, to his own taste. Now, it is an interesting point here that the institutional users do not want us to do their job for them. They want the oil coat on the French fries, but they don't want us to cook

(Testimony of Evan Gheen, Jr.)

them to the color that they want, nor do they want a cooked product, as that would not work out well in their own work. A retail user or a housewife usually follows the directions [7] that are contained on the label of the package. The cooking instructions are shown on the label and vary from a period of 10 to 25 minutes at approximately 400 degrees in the oven or, alternatively, in deep fat she could fry them for a period ranging from one and a half to two minutes to two and a half minutes at a temperature above or below 350 to 400 degrees.

Q. Now, the cooking for 15 to 20 minutes, how is that accomplished? In an oven? A. Yes.

Q. And is the purpose of that just to thaw them out and warm them up, or is there any actual cooking in the process?

A. Oh, a potato that was introduced into an oven is thawed out and starts to warm up so that it is warm to the touch at the end of two to three minutes, depending on the potato.

Q. What happens after that?

A. The rest of the time is used for the actual cooking process.

Q. This product, if you took a package out and simply thawed it out to get rid of the freezing, would it be a palatable product?

A. Well, yes and no. You could swallow it, but it is not healthy so to do.

Q. Why do the institutional users want the oil on the potato?

(Testimony of Evan Gheen, Jr.)

A. Because it decreases the amount of oil that [8] is absorbed by the potato in their own fryer, and we can buy oil cheaper than they can, and we can coat the potato cheaper than they can, and it decreases the amount of time that is required to reconstitute the product in their own shop.

Q. Is the oil coated French fry a more valuable product than a French cut?

A. Approximately two cents a pound. It varies sometimes up to three cents a pound.

Q. Now you also have something to do with freight rates, do you not?

A. That is correct. Not with the rates, but with the use of traffic.

Q. You are acquainted with the various tariffs that you use there in the plant?

A. In a general sort of way.

Q. Tell us what the history of the freight rates has been there as to the classification of the pre-trial order, the classification of Item 4715?

A. Well, as we got into the potato-processing business we originally commenced the shipping of our potato items under the same classification. After a period of time we were instructed that the potatoes which had been oil-blanching, or French-fried, according to the term that you like to use, were to be classed as a cooked vegetable, whereas all of the other potato items, together with all of the other items [9] which we processed, were to be classified in a different group which is called a fresh frozen product. At that time there was a

(Testimony of Evan Gheen, Jr.)

difference in cost or in the rate of shipping these two classifications, and we had customers——

Mr. Roos: Excuse me, your Honor. I would like to object for the record to any testimony with respect to a period outside of that within which the shipments in question moved.

The Court: You may continue, subject to the objection.

Mr. Gallagher: Go ahead.

A. At the time that the processed potato was making momentum, our customers violently objected to paying the difference in rate between a potato which had been oil-blanched or French fried and one which had not. It worked a hardship on the whole industry, so our first step was to request our local carrier to introduce something which would re-classify——

Q. Let me interrupt you there, Mr. Gheen. As I understand it, all your products out of your plant went out under this Item 4715. Then the question was raised as to the so-called French fries, and you were requested to ship them under Item 4600; is that correct? A. That is correct.

Q. And for a period of time they continued to be shipped under 4715, and then after that period [10] of time you shipped them under 4600?

A. That is correct.

Q. In water-blanching a potato for a minute and a half in water, does that completely kill the enzymes?

(Testimony of Evan Gheen, Jr.)

A. No, it takes a longer blanching than that, as I guess I introduced here a little while ago.

Q. Now, was the freight rate under both of these items, 4600 and 4715, originally the same in dollars?

A. I think that depends how far back you go. At the time we commenced shipping the volume was different.

Mr. Gallagher: I think you may cross examine.

Mr. Roos: Mr. Gallagher, was it your intention to introduce these labels?

Mr. Gallagher: Your Honor, we have reserved a place in the pre-trial order for exhibits, and Counsel and I have agreed, subject to the approval of the Court, that we might introduce a few labels.

Q. Mr. Gheen, you have been handed Exhibits 1, 2 and 3, Defendant's Exhibits for Identification. Can you tell us what they are.

A. They are labels owned by three of the customers for whom we pack.

Q. Do they relate to French fries?

A. Yes. We pack quite a few French fries under these labels for these customers. [11]

Q. And they are used in the plant for packing some of the particular French fries that are under consideration here?

A. That is correct.

Mr. Gallagher: We offer Defendant's Exhibits 1, 2 and 3.

Mr. Roos: No objection.

The Court: Admitted.

(The labels above referred to were thereupon

(Testimony of Evan Gheen, Jr.)

received in evidence as Defendant's Exhibits 1, 2 and 3, respectively.)

Q. (By Mr. Gallagher): Do those exhibits give the cooking instructions in some instances?

A. Yes, they do.

Q. And that is for the housewife or the institutional consumer? A. That is correct.

Q. Mr. Gheen, you have been handed what have been marked for identification as Defendant's Exhibits 4 and 5. Would you tell us what they are.

A. This appears to be portions of Tariff 2-U which governs the shipping of most of our products.

Q. Directing your particular attention to one of the exhibits which has the item 4600, and your [12] particular attention to the second page with the little arrow, is that the item under which the railroad requested you to ship these French fries under Item 4600?

A. Yes, in that sense. I am not sure whether you would call it the railroad or the Classification Committee, but we were instructed to use it by both.

Q. In any event, that is the tariff that we are speaking of, is it not, No. 4600?

A. That is correct.

Q. Referring to the other exhibit containing Item No. 4715, on the first page thereof is an arrow. Is that the item under which you have shipped all of the products of the plant which are frozen?

A. Yes, we have shipped all of them under this group at one time, and at another time it was divided between the two.

(Testimony of Evan Gheen, Jr.)

Mr. Gallagher: We offer Defendant's Exhibits 4 and 5.

Mr. Roos: No objection.

The Court: They are admitted.

(The excerpts from the tariffs above referred to were received in evidence and marked Defendant's Exhibits 4 and 5, respectively.)

Q. (By Mr. Gallagher): Mr. Gheen, can you give us a comparison in the cooking time of the various products of the plant, [13] the corn on the cob and kernel corn, and the mixed vegetables, and also carrots as compared to the cooking time of French fries?

A. Do you mean the blanching time?

Q. No, no. A. Cooking time?

Q. Cooking time by the housewife.

A. In a general sort of way it is very much the same thing. I think that can be best demonstrated by one of the exhibits over here on which I base a comparison of the cooking time for the different vegetable items that are frozen.

Q. Let's take mixed vegetables.

A. I think in a general sort of way that you could say that these items require from 8 to 22 minutes that are compared on this particular chart, and mixed vegetables 15 to 18 minutes.

Mr. Roos: Mr. Gheen, which exhibit are you referring to?

A. This is Exhibit No. 2.

Q. (By Mr. Gallagher): Let's compare the po-

(Testimony of Evan Gheen, Jr.)

tato patty. How long does it take to cook a potato patty?

A. Approximately the same time that it takes to cook a French fried potato, from 10 to 25 minutes, depending on the taste of the housewife and the accuracy of her oven, and so forth. [14]

Q. And kernel corn?

A. Very much the same. Let's see what it says on here. It says 6 to 8 minutes on kernel corn here.

Mr. Gallagher: I think you may cross examine.

Cross Examination

Q. (By Mr. Roos): Mr. Gheen, you have indicated that your position with the defendant is as Assistant Sales Manager?

A. That is my title, yes.

Q. And have you been employed in the plant proper or in the laboratories?

A. I am employed in the plant proper in the sense that there is only one plant. It is all one connected plant.

Q. You have given certain testimony with respect to blanching times and cooking times, and so forth. I will ask is that testimony given from your own personal observations or tests which you have made in the course of your duties, or is it more or less by information derived from other employees?

A. It is from both. I have at times examined blanchers and fryers for time and temperature. The particular figures which I introduced here were not my figures alone, but the figures as agreed upon

(Testimony of Evan Gheen, Jr.)

by several members so that I would not bias or otherwise misrepresent the actual facts. So in [15] the capacity that I exercise as quality control manager I called together our entire quality control group and asked them to verify these times and temperatures, and they so did before I came down here.

Q. With respect to this oil-blanching process, Mr. Gheen, is any flavor imparted to the potato as well as the heat?

A. The flavor of the oil, I guess, you would say would be imparted.

Q. Would you say it is that flavor which largely distinguishes French-fried potatoes from other types?

A. That is a very vague question. In the finished product the inside of the potato is—in the finished product as the ultimate user gets it the inside of the potato is very much like a baked potato and the outside has the flavor of oil, you might say, the crust.

Q. Now, have you ever merchandised potatoes cut in the shape of French fries without the oil-blanching process? A. We have so done.

Q. You have so done. But I understand that your customers prefer the oil processing to be performed by your plant; is that correct?

A. Very much so.

Q. Does the French-fried potato have any greater or less qualities of preservation than the water-blanching vegetables?

(Testimony of Evan Gheen, Jr.)

A. It depends on the degree of water-blanching, for one thing, [16] and on the inherent qualities of the potato. In a general way, a potato which has been oil-blanching would stay out in the open air for a slightly longer time than one which had not been oil-blanching. That is part of the reason for the coating of oil, is that it helps the chef in the time element that is involved in his work.

Q. Speaking of vegetables other than the French-fried potato, do certain of these vegetables have greater density—or may I ask you this: Do all of these other vegetables have greater density than the French-fried potatoes?

A. There are variations in density, and there are variations even among potatoes. Every potato is an individual.

Q. Separately taking vegetables other than potatoes of any kind, in shipping them would you say carrots and peas have the greatest density of any of the vegetables?

A. I wouldn't say that I am technician enough to answer that question.

Q. Can you tell us whether these other vegetables move at greater or less minimums under the tariffs? Do you happen to know that?

A. They move under very similar minimums. The minimums, in a general way, that we have used have been 46,000 pounds per car or 60,000 pounds per car.

Q. Now, you indicated on direct examination that French-fried potatoes, as I heard it, are a more

(Testimony of Evan Gheen, Jr.)

valuable commodity [17] than the French-cut potatoes. A. By two to three cents.

Q. By two to three cents. And the French cut, I understand, have not been subjected to the oil blanching? A. That is correct.

Q. Taking the French-fried potatoes as such, in the hands of the consumer, as far as you know, it is used only as a French-fried potato; is that correct? In other words, in the course of preparation the resulting product for the one who is going to consume it is that it is identified only as a French-fried potato; it is not ordinarily adaptable for other types of cooking. For instance, would you use it in soups?

A. I don't think, by and large, that you would use it for anything else.

Q. That is right. Now, on the other hand, the other types of vegetables which have been subjected only to water-blanching might be used by the housewife for many different cooking purposes?

A. It depends on the shape of the product that is presented to them.

Q. For instance, let's take peas. Your frozen peas are used—I assume they can be boiled and served as such; is that right?

A. Correct. [18]

Q. And they can be served in salads?

A. You would cook them first, I think.

Q. You would cook them, yes, that is right. But they could be served in salads and they could be placed in stews and soups; isn't that right?

(Testimony of Evan Gheen, Jr.)

A. Yes.

Q. Does your company, Mr. Gheen, produce other frozen products such as frozen pies?

A. We manufacture no pies.

Q. You do not? A. No.

Q. You simply furnish the ingredients, the vegetables? A. That is correct.

Q. Are you familiar at all with the manner in which certain of these other frozen products, such as peas, are prepared by the consumer, or the duration of time which it takes to prepare them for the table?

A. Well, I am not too familiar with that, no.

Q. Now, on Exhibit 1, which is the label for the Bel-air French-fried potato, what process is used for the French-fried potato so packaged, and in which it is referred to on the label as cooked in pure vegetable oil? Is it the same process you have described for all of these?

A. It is the same process as I described for the oil blanching with the exception that we introduce a slight amount [19] of color to the product. In this particular case, measured by U.S.D.A. standards, the color would be gauged between 1 and 2 U.S.D.A. And in order to introduce this color there is an increase in the time of approximately 15 to 30 seconds.

Q. Now, is your product then produced more or less in accordance with the specifications of your customer? A. That is correct. They are.

Q. And I understand, then, that he specifies a

(Testimony of Evan Gheen, Jr.)

particular shade of color which you have indicated might be No. 1, No. 2 or—how far do these designations go?

A. He designates the color. A particular buyer of frozen food, they specify the color. Others do not.

Q. Will you tell us all of these specifications of color. You indicated some numbers. How many numbers are there?

A. There are a total of four numbered colors. However, there can be color above and below the four numbered ones. The colors are 1, 2, 3 and 4, in order light, medium, dark and very dark.

Q. This sort of specification is peculiar, is it not, to French-fried potatoes?

A. No, no. It is not peculiar. The same customer has defined each step in the process in other commodities as well as this one.

Q. Do you mean to say with respect to peas and carrots he will define the period of time—— [20]

A. The time and temperature that is required, yes.

Q. Now, on Exhibit No. 3, the cooking instructions, there are certain descriptive notes, as follows: "High quality potatoes have been carefully selected, peeled, washed and cut. After being fried in pure vegetable oil they are immediately quick-frozen." Now, by the use of the term "fried in pure vegetable oil" do you mean to describe the oil-blanching process which is used for all potatoes?

A. The term is applicable in the sense that the

(Testimony of Evan Gheen, Jr.)

industry and the consumer understand it in that way.

Q. What do you think the consumer understands by the word "fried"?

A. The word "French-fried" was in existence before the processed potato came along, and other processors were in business approximately for ten years before we came along in our little plant over in Ontario there, so some folks called this same product oil-blanched and some folks called it French-fried. As the housewife thinks of it, she understands in her own mind that this product has to be cooked before it is ready to eat. We understand it, also, so between us we have a common agreement about what the term means. To institutional users we oscillate in describing the product. We sometimes use the term "oil-blanched" and we sometimes use the term "French-fried," according to what the particular customer has become acquainted with. [21]

Q. Now, let me ask you this: Is this same type of label used both for the institutional customers as well as the housewife?

A. That is a retail label, used only——

Q. When you say that, are you referring to——

A. Any of those.

Q. Any of these three?

A. Any of those smaller labels are only for the housewife, sold through stores.

Q. The label for the institutional user has to carry different instructions?

(Testimony of Evan Gheen, Jr.)

A. It is not actually a label in the sense that you think of that being a label. The instructions are sometimes printed on the case, the shipping case in which the product goes forward.

Q. Incidentally, as far as these several shipments involved in this case are concerned, would it be correct to say that in practically every case, both institutional as well as the product for use by the housewife, they moved in the same shipments, or could that have been the case?

A. It could be, but there is no general rule governing that.

Q. No general rule?

A. It is just happenstance.

Q. You have indicated as far as the preparation by the [22] housewife is concerned that she could prepare this in one of two ways. One, I believe, was to dip them in deep fat; is that right?

A. Yes.

Q. Or she may bake them in the oven?

A. Yes.

Q. You testified that after three minutes, I believe the time was, the potatoes should begin to warm up. Now, did you mean to say by that statement that the potato was sufficiently heated in that time right through to the middle and ready to serve on the table?

A. No. Yesterday this very question came up. If I may, I will give you a background of it. In our own minds we were wondering how you folks would think of this, so we called the U.S.D.A. men in our

(Testimony of Evan Gheen, Jr.)

plant and asked them to take the product under question here and put it in the oven and see how many minutes it took to take the cold out of it, and then to eat it, and then to follow the instructions by submitting it to the rest of the heating time. And their answer to us was that it took between two and three minutes to take the cold out of the product so that the product was warm to the touch. The product still tasted raw in their mouth at that stage. And that it took the rest of the cooking time in order to get it cooked in readiness to eat.

Q. Of course, I understand the extent of the cooking time [23] is a matter of the taste of the housewife?

A. That is correct; very much so.

Q. Whether the potato would be firm or soft?

A. Yes.

Q. Now, Mr. Gheen, returning once again to these specifications, you have indicated the specification by color number. Now, can you give us an idea as to what times are involved there? In other words, what is the spread, the time spread?

A. The time spread is 30 seconds. We don't set about to produce anything higher than a No. 2 in color. Institutional users are predominantly zero to one, from colorless to a light color. All they want is the oil coating on there. The retail housewife—these buyers who interpret the housewife's desires say that they want something halfway between a 1 and 2 in color. To achieve a zero to one we pass it through for a period of one minute plus or minus.

(Testimony of Evan Gheen, Jr.)

To achieve a 1 to 2 color we pass it through for a period varying up to one and a half minutes.

Q. The 1 to 2 color, I assume, is the color one might ordinarily find on the potatoes as served on the table; isn't that right?

A. That is correct. It is described as a light golden color.

Mr. Roos: That is all, your Honor. [24]

Redirect Examination

Q. (By Mr. Gallagher): Just a couple of questions, Mr. Gheen. Regardless of the color, do all these French fries have to be cooked after they leave your plant?

A. Yes, they do. They require cooking.

Q. Does it take any different length of time to cook them by the housewife whether they are No. 1 color or No. 2 color?

A. No, for the reason that the color is not attributable chiefly to the oil but to the sugars that are inherent on the surface of the potato. Therefore, the housewife's cooking time is very much the same.

Q. The institutional users who want the zero to No. 1 color, as I understand, what they are after is the oil coating for the advantage that you have described?

A. That is correct.

Q. That is, less oil has to be used by the hotel or restaurant or operator?

A. That is correct. They say to us, "Let us put the color on. We know our business."

(Testimony of Evan Gheen, Jr.)

Q. They consume less of their own oil; in other words, you are selling grease and potatoes?

A. Yes.

Q. Now, on the question of labels, regardless of what you call it, whether it is described there as a French fry [25] or an oil blanch, is this the process that you go through regardless of—

A. The process is identical.

Q. You were asked about minimum rates. What is the significance of that, if any?

A. From my point of view, you mean?

Q. Yes, from your point of view.

A. I don't know what the particular significance might have been in their minds as they asked me the question. We are able to load the cars to the required capacities of 46,000 and 60,000 pounds on all the products that we pack. Therefore, it is not a limiting factor.

Q. Do you have some problem in connection with the minimum weights if you have these two classifications in one carload? In other words, if you have French fries—

A. No, the minimum weights are identical regardless of whether it is French fries or other frozen vegetables.

Q. Then do you have any other problem? If you have a half a carload of French fries and half a carload of mixed vegetables, does that create a problem?

A. The only problem that creates is that in the

(Testimony of Evan Gheen, Jr.)

difference in classification there results a difference in rate sometimes, depending on which period we are discussing. But that is a problem to us and a problem to the customer.

Q. Now, if this potato did not have an oil coating on it, [26] would the housewife be able to prepare it by putting it in the oven?

A. She could prepare it, but it wouldn't necessarily be something she would want.

Q. It would not be a desirable thing without this oil coating? A. Not in our opinion.

Q. You find that true in the trade?

A. Yes.

Q. That is why you put the oil coating on it?

A. Yes.

Q. You were asked about density. Do you know generally the density difference between a carrot and—

A. In a general sort of way the density of a potato is greater than the density of water.

Mr. Gallagher: I think that is all.

Mr. Roos: Nothing further.

(Witness excused.)

Mr. Gallagher: Your Honor, I may or may not have one other witness. If I had a couple of minutes to talk to him, then I know we will be through by noon.

The Court: Take five minutes.

(Short recess.) [27]

Mr. Gallagher: That completes our testimony in the case in chief, your Honor.

Mr. Roos: The plaintiff has no rebuttal. We rest.

The Court: I will hear you in argument now.

(The matter was argued to the Court by Counsel for the respective parties and was thereafter taken under advisement by the Court.) [28]

[Endorsed]: Filed May 15, 1957.

[Endorsed]: No. 15582. United States Court of Appeals for the Ninth Circuit. Union Pacific Railroad Company, a corporation, Appellant, vs. Ore-Ida Potato Products, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 7, 1957.

Docketed: June 14, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15582

UNION PACIFIC RAILROAD COMPANY, a
corporation, Plaintiff-Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC., a cor-
poration, Defendant-Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

Comes now appellant and files this, its statement of points on which appellant intends to rely on the appeal of this cause, to wit:

(1) The trial court erred in its Findings of Fact No. XII by concluding that "the potatoes herein do not lose their substantial identity in the process described in Par. XI above and are frozen fresh vegetables" and "are not a frozen cooked food".

(2) The trial court erred in its Conclusion of Law No. 1, which reads:

"That the process described in Paragraph XI above involves the preservation of potatoes by blanching and freezing. That by reason of the process described in Paragraph XI above, the potatoes are not cooked and are not prepared for final consumption. That they are not properly classified under Item 4600 of the Tariffs

described in Paragraph V of the Agreed Facts as cooked foods.”

(3) The trial court erred in its Conclusion of Law No. II, which reads:

“That they are properly classified as frozen vegetables under classification 4715 of the Tariffs described in Paragraph V.”

(4) The trial court erred in its Conclusion of Law No. III, which reads:

“That by reason of the above the defendant is entitled to recover from plaintiff as overcharges, including the Federal transportation tax on the shipments described in Paragraph IV of the above the sum of \$5,331.24.”

(5) The trial court erred in failing to conclude and hold that the potatoes, by reason of the process described in Paragraph XI of the Findings of Fact, lost their identity as raw potatoes or fresh vegetables, but are a frozen cooked food.

(6) The trial court erred in failing to conclude and hold that the process described in Paragraph XI of the Findings of Fact involves the preparation of potatoes for consumption by the action of heat and renders the product a “food cooked, cured or preserved” within the meaning of the tariffs described in Paragraphs V and VI of the Findings of Fact.

(7) The trial court erred in failing to conclude and hold that said potatoes are not properly classified as “vegetables, fresh or green” under Item

4715 of the tariff described in Paragraphs V and VII of the Findings of Fact.

(8) The trial court erred in failing to conclude and hold that by reason of the Findings of Fact I through XI inclusive the plaintiff is entitled to recover from the defendant as undercharges, including the Federal Transportation Tax, on the shipments described in Paragraph IV of the Findings of Fact the sum of Six Thousand Two Hundred Thirty-six Dollars and Eighty-six Cents (\$6,236.86) plus interest and costs.

(9) The trial court erred in failing to grant plaintiff-appellant's motion for summary judgment.

(10) If the Court finds that the language of Items 4600 and 4715 of the tariffs described in Paragraphs V and VII of the Findings of Fact was not used in its ordinary sense, and that extrinsic evidence is necessary to determine the meaning of such language in the light of trade usages and practices, then the District Court had no jurisdiction of the controversy in advance of a determination by the Interstate Commerce Commission of the effect of such language as so used.

Respectfully submitted this 14th day of June, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Appellant.

[Endorsed]: Filed June 17, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

Comes now appellant and designates the following portions of the record on appeal to be printed herein, which includes all of the record which either appellant or appellee deems material to the consideration of the appeal, to wit:

As Designated by Appellant by Designation of Record on Appeal Filed in the District Court:

1. Plaintiff's complaint (filed January 17, 1956).
2. Certificate of Service and Answer (filed April 9, 1956).
3. Reply to counter-claim (filed May 31, 1956).
4. Pre-trial order (filed February 13, 1957).
5. Motion for summary judgment (filed February 11, 1957).
6. Memorandum of decision (filed March 14, 1957).
7. Findings of fact and conclusions of law (filed March 18, 1957).
8. Judgment (entered March 18, 1957).
9. Notice of appeal (filed April 15, 1957).
10. Appellant's statement of points.
11. Supersedeas bond on appeal (filed April 15, 1957).
12. Appellant's designation of record on appeal.
13. Order for transmittal of exhibits.
- 13-A. Amended order for transmittal of exhibits.
14. Amendment to designation of record on appeal.

15. Appellant's supplemental statement of points.
16. Transcript of docket entries.
17. Clerk's certificate.

Exhibits four (4) and five (5).

As Designated by Appellee By Additional Designation of Record on Appeal Filed in the District Court:

12-A. Defendant's additional designation of record on appeal.

Transcript of the testimony and all proceedings had at the trial of this cause in the District Court.

Respectfully submitted this 14th day of June, 1957.

/s/ ROY F. SHIELDS,

/s/ HOWARD E. ROOS,

Attorneys for Appellant.

[Endorsed]: Filed June 17, 1957. Paul P. O'Brien, Clerk.

